

United States Department of Labor
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
Washington, D.C. 20001

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Date: January 29, 1998

Case No. 96 IA 264

In the Matter of:

T & T DONUTS, INC. T/A DUNKING DONUTS,
Employer,

on behalf of:

JULHILDERIN S. JANANI,
Alien.

Appearance: J. J. Hykel of Philadelphia, Pennsylvania

Before : Lawson, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of JULHILDERIN S. JANANI (Alien) by T & T DONUTS, INC. T/A Dunking DONUTS (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer (CO) of the U.S. Department of Labor at Philadelphia, Pennsylvania, the application, and the applicants requested review pursuant to 20 CFR § 656.26.¹

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of U. S. workers.²

STATEMENT OF THE CASE

On March 24, 1994, the Employer applied for labor certification on behalf of the Alien for the position of Cook, Pastry. AF 55-60. Employer listed the following duties for the position:

Employee will: prepare and bake cakes, doughnuts, pastries, and other baked goods, such as doughnuts, eclairs, muffins, croissants, munchkins, cookies, macaroons, brownies, etc., according to recipes; measure ingredients using measuring cups and spoons; mix ingredients to form dough for cookies and fancy pastries using dough roller and cookie cutters or by hand. Place shaped dough portions in greased or floured pans and insert them in the oven using long-handled paddle. Adjust drafts or thermostatic controls to regulate oven temperatures. Prepare and cook ingredients for fillings or other pastries. Pour filling into cake and doughnut shells and top filling with meringue and cream. Mix ingredients to make icings. Decorate cakes and pastries. Blend colors for icings and shaped sugar ornaments and statuary.

Employer offered \$10.75 per hour for this 35 hour a week position, and time and a half for overtime. The educational requirement was high school graduation, and the experience requirement was two years in the job offered or two years in the related occupation of Baker Helper. AF 57.³

Notice of Findings. On October 26, 1995, the Certifying Officer (CO) issued a Notice of Findings (NOF) in which certification was denied, subject to rebuttal. At this time the CO said the DOT position was reclassified from Cook, Pastry, for which the DOT Specific Vocational Preparation

²Administrative notice is taken of the Dictionary of Occupational Titles, (DOT) published by the Employment and Training Administration of the U. S. Department of Labor.

³The related occupation originally was "Baker, Pastry" but was changed to "Baker, Helper" after the date of filing.

(SVP) requires two to four years of experience, to Doughnut Maker, for which the SVP is from three to six months. The CO said that a Cook, Pastry in the DOT prepares and bakes cakes, cookies, pies, puddings, desserts, and other fancy pastries according to recipes.⁴ A Doughnut Maker, mixes, forms, and fries dough to produce doughnuts, according to work order. This more accurately describes the position for which Employer seeks certification. AF 30.⁵ The CO said that successful preparation and baking of doughnuts in fast food establishments such as that of the Employer does not require the skill level of a worker who can successfully bake a large variety of desserts and fancy pastries according to recipes. Accordingly, the SVP for a Doughnut Maker of three to six months experience is found to be correct and the Employer's requirement of two years experience was found to be excessive. The CO explained that the Employer could rebut the inference that the job requirement was unduly restrictive by filing evidence that the greater experience requirement arises from a business necessity or by amending that requirement and re-advertising the

⁴**313.381-026 COOK, PASTRY** (hotel & rest.) alternate titles: baker, cake; baker, pastry; cake maker. Prepares and bakes cakes, cookies, pies, puddings, or desserts, according to recipe: Measures ingredients, using measuring cups and spoons. Mixes ingredients to form dough or batter, using electric mixer or beats and stirs ingredients by hand. Shapes dough for cookies, pies, and fancy pastries, using pie dough roller and cookie cutters or by hand. Places shaped dough portions in greased or floured pans and inserts them in oven, using long-handled paddle (peel). Adjusts drafts or thermostatic controls to regulate oven temperatures. Prepares and cooks ingredients for pie fillings, puddings, custards, or other desserts. Pours filling into pie shells and tops filling with meringue or cream. Mixes ingredients to make icings. Decorates cakes and pastries [CAKE DECORATOR (bakery products) 524.381-010]. Blends colors for icings and for shaped sugar ornaments and statuary. May specialize in preparing one or more types of pastry or dessert when employed in large establishment. May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.10.08 STRENGTH: M GED: R4 M3 L3 SVP: 7 DLU: 77

⁵**DOUGHNUT MAKER** (bakery products) alternate titles: baker, doughnut; cruller maker. Mixes, forms, and fries dough to produce doughnuts, according to work order: Dumps prepared doughnut mix into mixing-machine bowl, adds water and dehydrated eggs, and starts mixer. Turns switch on heating unit of frying tank and sets thermostat at specified temperature. Dumps dough from mixing bowl into hopper of doughnut cutter. Sets lever to control amount of dough that doughnut cutter will portion to frying tank. Moves cutter machine back and forth over frying tank and depresses trigger to eject individual doughnuts into hot cooking oil. Turns doughnuts over in tank, using stick. Lifts wire tray of fried doughnuts from tank and places it in glazing tank. Slides trough containing glazing syrup over doughnuts. May glaze doughnuts, using hand dipper. May roll dough with rolling pin and form doughnuts with hand cutter. May lower wire tray of uncooked doughnuts into fryer, using hooks. May tend automatic equipment that mixes, cuts, and fries doughnuts. May weigh cut dough and fried doughnuts to verify weight specifications, and adjust controls of equipment accordingly when weights vary from standards. GOE: 06.02.28 STRENGTH: M GED: R3 M1 L1 SVP: 4 DLU: 78

position. AF 30-31.

Rebuttal. Employer's rebuttal evidence included a statement from Florenci Timbol, the Employer's treasurer and general manager, who said the two year requirement was necessary because this was a position in the night shift, when the greatest quantity and variety of pastries is baked. AF 08-09. The letter from Ms. Timbol was supported by corroborating letters by Asuncion A. Tolentino and Bernardo C. Perez, Jr., who agreed with her comments. AF 12-13. Employer's Rebuttal also included pictures of display cases filled with special holiday pastries and copies of recipes for several baked items, including bagels, sweet yeast products, and bun dough. AF 23-26.

Final Determination. The Final Determination denied certification on February 12, 1996. AF 03. The CO explained that the Employer's rebuttal evidence was not sufficient to establish that functions of this position were those usually performed by a Cook, Pastry, as the recipes and pictures did not demonstrate that cakes, pies or a large variety of fancy pastries are either baked or sold by the Employer. AF 04. The CO explained that the "Limited number and variety of items such as bagels and muffins is not compelling evidence that this position should be coded as a Cook, Pastry." AF 05.⁶ The CO said the two letters of support were not persuasive since the main reason for a longer experience requirement was the nature and volume of baking done by the worker in this position. Finding that the Employer failed to establish a business necessity for the two years of experience required for the position of a Doughnut Maker, rather than for a Cook, Pastry, the CO denied certification. AF 04, 05.

Appeal. Employer's requests for review on October 24, 1995, and March 8, 1996, contend that the position requires a Cook, Pastry. AF 01, 02. Moreover, the Employer argued that the CO erred in relying on an ex parte communication with the Dunking Donuts University. AF 02.

Discussion

⁶The CO added that an ex parte inquiry of "Dunking Donuts University" suggested that a five week training course fully qualifies a prospective manager with the necessary skills in baking, bookkeeping, and managing a Dunking Donuts franchise. AF 06. While the evidence from the "Dunking Donuts University" indicated that a five week training course fully equipped a prospective manager with the necessary skills in baking, bookkeeping, and managing a Dunking' Donuts franchise, we find that this evidence was not relevant and we do not agree that there is a relevant connection between the training the franchiser requires for an outlet manager and the training needed to manufacture these baked goods. AF 07.

The finding on which the CO denied certification was based on the Employer's violation of 20 CFR § 656.21(b)(2) which requires an employer to fix the hiring requirements for a job at the criterion normally required for the performance of the job in the United States. In this case, the position was that of Doughnut Maker, which has a Standard Vocational Preparation (SVP) of not less than three months or more than six months of combined experience, education, and training. Employer contended on appeal that the CO should have classified the position as a Baker under the DOT criteria. Employer argued that the worker would be producing bakery goods other than doughnuts normally manufactured as part of the Dunking Donuts line. Employer's argument relied on the varying descriptions of the job at issue, comparing the DOT description of the position of a Baker with the DOT position description of a Doughnut Maker.

Employer relies primarily on a comparison of the positions as stated in the DOT. While there are clear differences between the DOT descriptions of the positions of Baker and Doughnut Maker, the Employer this difference is not definitive because the job set forth in its application is very close to the DOT description of the usual duties of a doughnut Maker and is not at all similar to the work of a Baker. For these reasons the panel finds that sufficient evidence supported the CO's finding that the Employer's application for alien certification described a Doughnut Maker and that the criteria for experience and training that it required were unduly restrictive within the meaning of 20 CFR § 656.21(b)(2).

Although Employer argued that the CO erred in relying on an ex parte conversation with the Manager of Training at Dunking Donuts University in denying this application, this case will not be remanded under **Serve Fashion, Inc.**, 90 IA 027 (Dec. 7, 1990). It is reasoned that, even though the CO made reference to this source in the Final Determination, but made no reference to this conversation in the NOF, there is an obvious difference between the DOT job descriptions of a Baker and a Doughnut Maker. The clear similarity between a Doughnut Maker and the position described in Employer's application is the factual element that controls the denial of certification. Because the comments of the Dunking Donuts University Manager of Training were addressed entirely to the training of a franchise manager and not to the training of a production employee, no deference or weight was merited by them, as the SVP for a Doughnut Maker and not a franchise manager was the issue. It follows that this evidence cannot have any bearing on the determination of the issue. While the CO's mention of the evidence was erroneous, it did not vitiate the otherwise correct

disposition of the matter and reconsideration on remand will not alter the CO's Final Determination, based on the evidence of record.

Accordingly, the following order will enter.

Order

The Certifying Officer's denial of alien labor certification is hereby affirmed.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

Dissent:

Judge Lawson dissents from the conclusion and opinion of the majority.

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

